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No. 487

Supreme Court of the United States.

OCTOBER TERM, 1949.

AMOS L. TAYLOR, EXECUTOR UNDER THE WILL OF JESSE P. LYMAN, *Petitioner*,

v.

UNITED STATES.

ON PETITION FOR A WRIT OF CERTIORARI TO THE PROBATE COURT FOR THE COUNTY OF MIDDLESEX AND COMMONWEALTH OF MASSACHUSETTS.

REPLY BRIEF OF AMOS L. TAYLOR, EXECUTOR, PETITIONER.

WALDO NOYES,
SENECA B. ANDERSON,
Attorneys for Petitioner.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

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I.

Just below the middle of page 6 of the Government's Brief, the Solicitor General says: "It can hardly be supposed that Congress intended to compel the Government to pursue a more circuitous course with an admitted debt claim than other creditors in like circumstances . . . Decisions of the federal courts have, however, recognized that state probate courts may receive and allow claims for federal taxes, without making any distinction as to whether the claim is contested or uncontested."

In the first place, this statement is a flat denial of the correct doctrine enunciated by this and other Courts with

respect to statutory construction when there is no ambiguity. See Petitioner's Brief, pp. 18-19.

In the second place, the Solicitor General draws no distinction between claims for taxes which are disputed as such, and claims which in their inception are undisputed but the enforceability of which is disputed by reason of failure to comply with conditions precedent, such as that imposed by U.S.C. (1946 ed.) Title 26, § 3740; or by reason of an applicable statute of limitations, as, for instance, U.S.C. (1946 ed.) Title 26, § 276 (c). Petitioner's position is that any contest as to the collectibility of a Federal tax based upon defenses arising under the Federal statutes can be tried only in a District Court of the United States under the provisions of U.S.C. (1946 ed.) Title 26, § 3744.

In the third place, the cases cited by the Government at the bottom of pages 6 and 7 of its Brief as being cases which "recognized that state probate courts may receive and allow claims for federal taxes without making any distinction as to whether the claim is contested or uncontested" are, as pointed out in the Petitioner's Brief, cases where such claims were considered by Probate Courts *in the absence of any objection* thereto and without any decision as to whether they were properly before said Courts. See Petitioner's Brief, p. 29.

II.

The Solicitor General, at pages 7 and 8 of his Brief, relies upon the provisions of § 3466 of the Revised Statutes, set forth in the Appendix to his Brief, p. 16. This statute establishes on behalf of the United States a priority for the payment of taxes due to it, a pronouncement and requirement which have nothing to do with the manner of the collection of the tax and cannot properly be considered a qualification or limitation upon the requirements of

U.S.C. (1946 ed.) Title 26, § 3744, nor grant any immunity therefrom. Section 3466 is not a procedural statute relating to the commencement and prosecution of suits, and does not as such confer jurisdiction. The same is true of the "implementation" of § 3466 by § 3467. Section 3744 is the statute which confers and limits jurisdiction.

The point is that, while the Government establishes the priority of its claim to payment, it must enforce its claim in the way prescribed by the statute or the priority will be lost, because obviously, if the claim is lost, the priority will be lost as well.

III.

At the middle of page 8 the Solicitor General argues that "the practice of filing claims for unpaid taxes of deceased persons with their executors has long usage to support it and has never before been challenged," citing the cases, most of which have been explained by the Petitioner in his Brief, as cases where the jurisdiction of the Court has never been challenged or decided. Obviously, the fact that other defendants have slept on their rights or been unaware of them is immaterial as a matter of law on the question of whether this Petitioner, who has pleaded his defenses and the lack of jurisdiction in his case, has lost his rights. Mere usurpation, or continued abuse, of jurisdiction by courts, or violation of constitutional privileges, however long continued, can never in and of themselves create jurisdiction or destroy privileges which exist continuously as a matter of law.

In any event, the Solicitor General's argument, that a continued practice sanctifies and requires a judicial disregard of the unambiguous words of the statute, sets up a situation which in itself seems to call for review of this case upon certiorari.

IV.

On page 9 of his Brief the Solicitor General argues that the filing of the instant claim was a "proceeding in court" within the meaning of § 276 (c) and that it is sanctioned by that section. Again we must point out that § 276 (c) is not a statute conferring jurisdiction; it is really a statute of limitation. The only statutory jurisdiction conferred in this case is by § 3744. Abraham Lincoln is reported to have said: "Calling a sheep's leg a lamb's tail does not make it one." We urge again that this proof of claim was a suit because it had all the characteristics of a suit, see Petitioner's Brief, pp. 9-10, 32-35, and as a suit comes within the requirements of § 3744.

V.

Two-thirds of the way down page 9 the Solicitor General says: "The executor does not assert a conflict with any decision construing the statutory provisions involved in this case. . . ." Your Petitioner has clearly made the point, on pages 10 and 11 of the Petition, that § 3744 has never been judicially construed and that the decision below is in conflict with the clear meaning of the Federal statutes and the decisions of this Court which are cited at the top half of page 10 of the Petition.

VI.

Turning now to U.S.C. (1946 ed.) Title 26, § 3740, which contains the condition precedent to bringing suits for taxes, counsel for the Petitioner admit their inadvertent mistake in setting forth the current revision of this statute as applicable to the situation in the instant case (Government's Brief, p. 10, footnote). It is pointed out, however, that in any event R.S. § 3214 requires the authorization or sanc-

tion of the Commissioner of Internal Revenue, and that this was a condition precedent to the bringing of any suit.

The Solicitor General at page 10 of his Brief, says: ". . . the facts regarding such authority would not be essential elements of the cause of action involved in the suit to recover taxes, . . ." The words of the statute are: "No suit for the recovery of taxes . . . shall be commenced unless the Commissioner of Internal Revenue authorizes or sanctions the proceedings." We must believe that these words of the statute have some effective meaning and are not utterly superfluous. The Solicitor General's argument, if adopted, would force one to construe the statute as meaning that the taxpayer's only right is to prove affirmatively the lack of authority in question under the double burden that (*a*) he cannot obtain, without the voluntary co-operation of the Government, the evidence necessary to support this burden of proof; and (*b*) he is called upon to prove the negative of a proposition, namely, that one specified act has never been performed. Under the Solicitor General's argument, unless the Government *chooses* to furnish the proof of its own lack of authority, the taxpayer is precluded even from challenge on that point—a result which violates a principal canon of statutory construction because no effect would be given to words which are clearly unambiguous.

VII.

At the bottom of page 10 the Solicitor General says: ". . . proper authorization for the claim filed by the Collector of Internal Revenue is to be presumed," citing cases in which the authority of the Collector has not been challenged, but paying no attention to the pertinent cited cases of *United States* v. *Cadillac Sedan*, 145 Fed. (2d) 296, and *Olson* v. *Mellon*, 41 Fed. Sup. 947, which relate directly to

the problem before this Court, being cases where the authority of the Collector has been seasonably challenged, see pp. 11-12 of the Petition; and pays likewise no attention to the rule of law enunciated by this Court in the three cases cited at the top of page 13 of the Petition to the effect that "nowhere is the presumption held to be a substitute for proof of an independent and material fact." Certainly a condition precedent prescribed by the statute is an independent and material fact.

VIII.

On page 11 of his Brief the Solicitor General says: ". . . the fact that the claim has been prosecuted to its present posture by the Attorney General on behalf of the Treasury Department gives ample proof that the filing of the claim has been sanctioned by both the Attorney General and the Commissioner." The fallacies of this argument are obvious:

(*a*) The requirement of the statute is for the performance of a condition precedent to the filing of suit, obviously within the required six-year period of the statute of limitation, § 276 (c).

(*b*) A sanction at this late date can at best be a ratification; coming in every respect after the commencement of suit and in large part after the expiration of the six-year statute of limitations § 276 (c), it cannot recreate a claim already outlawed, nor permit the prosecution of a claim barred by the decree of the District Court (R. p. 4, lines 99-101), because obviously this was not a "timely proceeding . . . pending in another court" if not brought in a court having jurisdiction and/or if the condition precedent to the bringing of the suit had not been complied with.

(*c*) A statute which prohibits suits "unless the Commissioner authorizes or sanctions the proceedings" is not

complied with by action of the Attorney General as a law officer acting on behalf of the Commissioner; the statute is specific that the Commissioner must authorize or sanction and there is no evidence that he did so—the record by its silence is eloquent of the fact that this requirement of § 3740 has not been met.

Respectfully submitted,

WALDO NOYES,

SENECA B. ANDERSON,

Attorneys for Petitioner.